93-790

OCT 2 3 1993
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RUSSELL LARSON,
Petitioner

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF CALUMET CITY, ILLINOIS, STEVEN NOWACZYK, EDWARD J. FITZGERALD, GUY L. EVELAND, STEVEN RHOADS, CHIEF OF POLICE AND CALUMET CITY POLICE DEPARTMENT.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Illinois Appellate Court should consider the impact of a new statute allowing administrative review complainants to amend their complaints, said statute applying to all pending cases, including those cases that have already been dismissed by a trial court.

2. Whether the refusal of the Appellate Court to reconsider the impact of a new statute constitutes denial of access to courts for consideration of the merits of an administrative review complaint.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests this court to issue a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District, to review that court's Decision and Opinion entered in the form of an Order on August 20, 1992, and subsequent order denying Petitioner's motion to vacate its prior opinion. The Illinois Supreme Court denied a Petition For Leave To Appeal on June 3, 1993, and on June 24, 1993 rejected a Petition For Rehearing.

OPINIONS BELOW

On August 20, 1992, the Appellate Court of Illinois, First Judicial Dis-

trict, entered an Order affirming a decision of the Circuit Court of Cook County dismissing an Administrative Review Complaint filed by the Petitioner to appeal an adverse decision of the Board of Fire and Police Commissioners of Calumet City. The decision of the Appellate Court essentially affirmed a motion to dismiss Petitioner's Complaint because Petitioner had not named the Chief of Police as a Defendant in the administrative review action.

On October 10, 1991, the Circuit Court of Cook County granted defendants' Motion to Dismiss the Amended Complaint. The Illinois Appellate Court affirmed that dismissal.

On June 3, 1993, the Illinois Supreme Court denied a Petition For Leave to Appeal and on June 24, 1993, rejected a Petition for Rehearing.

The Illinois Appellate Court on September 14, 1993 denied Petitioner's motion to vacate its prior order, said order having been filed because the Illinois General Assembly had enacted a statute allowing administrative review complaints to be amended which allows administrative review plaintiffs to amend their pleadings to include the Police Chief as a defendant. The statute became effective on July 20, 1993 and applies to all cases pending as of its effective date.

JURISDICTION

1. The jurisdiction of this Court is invoked under 28 USC §1257.

2. This Petition for Certiorari was filed within the time period allowed by this Court, the Court having allowed on September 3, 1993, the time for filing a

Petition for Writ of Certiorari to be extended to October 31, 1993.

CONSTITUTIONAL PROVISIONS

Amendment I

Congress shall make no law...abridging the freedom of speech, or of the press; . . . and to petition the Goverment for a redress of grievances.

Amendment V

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Amendment XIV

. . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Article IV

Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.

STATEMENT OF THE CASE

Petitioner filed an administrative review complaint to contest his discharge from employment. He was allowed to amend the complaint to add the police chief as a defendant, but the complaint was subsequently dismissed because it did not name the chief as a defendant at the time of original filing. After the dismissal was affirmed on appeal, a new statute was passed to allow police officers to amend their complaints. It applies to pending cases. The Illinois Appellate Court has refused to allow an amendment to the complaint pursuant to the new statute.

REASONS FOR GRANTING THE WRIT

Although no federal question was initially raised in the Circuit Court of Cook County or the Illinois Appellate Court First Judicial District, a question has arisen as a result of the Illinois General Assembly enacting Public Act 88-110, which provides for an administrative review complaint to be filed and subsequently amended to add a police chief as a defendant in cases involving discipline of police officers.

This case involves the discipline of a police officer and his failure to name the police chief as a defendant in his administrative review complaint appealing the decision of the Calumet City Board of Fire and Police Commissioners dismissing petitioner from employment. The Illinois Appellate Court affirmed a decision of the Circuit Court of Cook County dismissing

the complaint for failure to name the Police Chief as a defendant. Plaintiff's complaint in administrative review was filed on January 9, 1991, and it named as the defendants the Board of Fire and Police Commissioners and three individual members, upon whom summons was served on January 18, 1991. On February 20, 1991, the named defendants filed an Answer. On February 27, 1991, Plaintiff moved to file an amended complaint for leave to add the police chief as an additional party and stated that the police chief had been "inadvertently omitted" as a named defendant. The Circuit Court of Cook County granted Petitioner's motion to add the Police Chief as a defendant on March 14, 1991, and ordered that summons issue accordingly. The police chief was served on March 25, 1991, in the Police Department. On May 15, 1991, the Police Chief

entered a general appearance. On October 10, 1991, the Circuit Court of Cook County granted defendants' motion to dismiss.

After the Illinois Supreme Court denied a Petition for Leave to Appeal and rejected a Petition for Rehearing, the Illinois General Assembly passed, and the Governor of Illinois signed Public Act 88-110, which took effect on July 20, 1993. Under this amendment to the Illinois Code of Civil Procedure, police officers may amend administrative review complaints to add a police chief as a defendant. This amendatory act applies to all pending cases and the instant case is governed by this amendment.

Petitioner requests this Court to grant the Writ of Certiorari to require the Illinois Appellate Court to consider the impact of this legislation which allows petitioner to amend his complaint

and have his appeal determined on the merits. Petitioner asserts that the Illinois Appellate Court should have considered the impact of this statute when a motion to vacate the Illinois Appellate court order of August 20, 1992 was filed on August 31, 1993. That motion was denied on September 14, 1993, without comment. Petitioner believes that a way to return this matter to the Illinois Appellate Court is to grant the Petition for Certiorari. Petitioner further believes that any refusal of the Illinois Appellate Court to consider the matter of the new statute constitutes a denial of the right of access to courts and a violation of the First Amendment, and the due process clauses of the Fifth and Fourteenth Amendments, and the privileges and immunities clause of Article IV, Section 2

of the U.S. Constitution. Morello v. James, 810 F2d 344 (2nd Circuit 1987).

For the reasons articulated herein, Petitioner requests this Petition to be granted and the matter remanded to the Illinois Appellate Court in order to consider the effect of the new statute.

Respectfully submitted,

ASHER, GITTLER, GREENFIELD, COHEN & D'ALBA, LTD.

By: _____
JOEL A. D'ALBA

_____
MARVIN GITTLER
Attorneys for Petitioner

APPENDIX

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-91-3694 AUGUST 20, 1992
FOURTH DIVISION

RUSSELL LARSON,
Plaintiff-Appellant,

v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF CALUMET CITY, et al.,
Defendants-Appellees.

Before: O'Brien, McMorrow, Johnson and Linn, Judges.

ORDER

On November 1, 1990, Steven A. Rhoads, Chief of Police of Calumet City, filed written charges against plaintiff, a sergeant of the police department of Calumet City, with the Board of Fire and Police Commissioners of Calumet City (hereinafter Board). On December 14, 1990, the Board found that plaintiff had

used drugs (cocaine) while employed as a police officer and discharged him. Plaintiff then filed this action for administrative review. (Ill. Rev. Stat. 1989, ch. 110, par. 3-101 et seq.) Plaintiff named as defendants the Board and its three individual members, but not Chief of Police Rhoads or the police department. Plaintiff appeals from an order of the circuit court dismissing with prejudice his action for administrative review for failure to name as parties and timely serve two necessary parties, Chief Rhoads and the police department. On appeal, plaintiff contends (1) he should have been allowed to amend his pleading under section 2-616 of the Code of Civil Procedure (Code) (Ill. Rev. Stat. 1989, ch. 110, par. 2-616), and (2) because defendants, including Chief Rhoads, submitted to the jurisdiction of the court by filing a

general appearance and answer, the court was revested with jurisdiction which might have been lost through the passage of time.

The record indicates that Chief Rhoads made the complaint against plaintiff and that he was one of the witnesses against plaintiff at the administrative hearing. On December 14, 1990, the Board issued its decision which stated in part that Chief Rhoads had filed charges with the Board against plaintiff, and the Board held a hearing on the charges in November 1990. The court found plaintiff was in violation of rules and regulations of the Calumet City police department and that he admitted under oath during the course of Federal criminal prosecution, that he had twice used cocaine while employed as a Calumet City police officer. The Board ordered plaintiff discharged.

Plaintiff's complaint for administrative review, filed January 9, 1991, named as defendants the Board and its three individual members, upon whom summons was served on January 18, 1991. On February 20, 1991, the named defendants filed an answer. On February 27, 1991, plaintiff moved to file an amended complaint and for leave to add an additional party, Chief Rhoads, on the basis that Chief Rhoads, and the Calumet City police department were "inadvertently omitted" as defendants. The court granted plaintiff's motion on March 14, 1991, and ordered that summons issue to the additional parties. Chief Rhoads was served on March 25, 1991 and the police department was served on March 27, 1991. On May 15, 1991, Chief Rhoads and the police department entered a general appearance.

On October 10, 1991, the court granted defendants' motion to dismiss plaintiffs' amended complaint pursuant to section 2-619(a)(1) of the Code. (Ill. Rev. Stat. 1989, ch. 110, par. 2-619(a)(1).) The court ruled that the police chief was a necessary party and that even an amendment beyond the 35-day period for filing the action and serving summons could not bestow jurisdiction where one did not join all necessary parties within the 35-day period. The court also ruled that the defendants' appearance and the failure to move to dismiss within the 35-day period did not operate as a waiver of the statutory requirements.

Plaintiff first contends that under the provisions of section 2-616 of the Code he should have been allowed to add additional defendants since he met the five conditions set forth in that section:

the original complaint was timely, the omission of Chief Rhoads was inadvertent, summons was served upon Chief Rhoads and he submitted to the jurisdiction of the court, service of summons upon the Board was adequate to place Chief Rhoads on notice that the action was pending and the cause of action against Chief Rhoads arose out of the same transaction as the original pleading. Ill. Rev. Stat. 1989, ch. 110, par. 2-616.

In Lockett v. Chicago Police Board (1990), 133 Ill. 2d 349, 549 N.E. 2d 1266, the court held that the superintendent of police was a necessary party in that action for administrative review, that the requirement that the complaint be filed within 35 days was jurisdictional and that the 35-day period for service of summons was mandatory but not jurisdictional. In Marozas v. Board of Fire and Police Com-

m'rs (1991), 222 Ill. App. 3d 781, 786-87, 584 N.E.2d 402, the court rejected the argument that notice to the Board constituted notice to the chief of police, following Lockett. A litigant must show a good-faith effort to file the complaint and secure issuance of summons within 35 days or the complaint for administrative review would be properly dismissed. (Lockett v. Chicago Police Board, 133 Ill. 2d at 355-56.) In this case, it is not disputed that Chief Rhoads was a necessary party and that plaintiff did not name him as a party or have summons issued upon him within 35 days. The record does not contain any evidence of a good-faith effort by plaintiff to comply with the statutory requirement, and the only justification offered for amending the complaint to add Chief Rhoads was plaintiff's

inadvertence. We find no basis for allowing such an amendment under Lockett.

The court properly dismissed the administrative review action unless there are factors to distinguish this case from the situation in Lockett. Plaintiff says that he raised the applicability of section 2-616 here, but the issue was not raised in Lockett and that in this case, defendants voluntarily participated in the proceeding by filing a general appearance and answer which revested the court with jurisdiction. The court in Lockett stated that the requirement that a complaint be filed within a 35-day limit is jurisdictional, and if a complaint is not timely filed, no jurisdiction is conferred on the circuit court and judicial review of the administrative decision is barred. (Lockett v. Chicago Police Board, 133 Ill. 2d at 354-55.) The court removed any doubt

on this point by stating that it was aware that the appellate court had held a failure to name and issue summons against necessary parties within the 35-day limit could be cured by subsequent amendment, and it explicitly overruled those cases. (Lockett v. Chicago Police Board, 133 Ill. 2d at 356.) Where complaint was made that the motion to dismiss plaintiff's case was made three years after the complaint was filed, the court observed that a motion to dismiss because of lack of jurisdiction can be raised at any time, and there was nothing in the Lockett decision that indicated that the timing of the motion to dismiss had any effect on the ruling. (Marozas v. Board of Fire and Police Comm'rs, 222 Ill. App. 3d at 786.) Lockett clearly precludes plaintiff's argument.

Plaintiff next argues that the court in Lockett did not consider the applicability of the revest doctrine. He also argues the section 2-619 motion was untimely because it was not filed within 35 days of service of summons. We find this argument unpersuasive because it was not raised in the trial court and is not supported by authority; also, the lack of subject matter jurisdiction may be raised at any time. (Talandis Construction Corp. v. Illinois Building Authority (1978), 60 Ill. App. 3d 715, 718, 377 N.E. 2d 237.) Plaintiff urges application of the revestment doctrine stating that the loss of jurisdiction due to passage of time is a technical issue that may be waived. In Faust v. Michael Reese Hospital (1979), 79 Ill. App. 3d 69, 72, 398 N.E.2d 287, cited by plaintiff, the court said:

"The well-established rule is that where a court loses jurisdiction because 30 days have passed after a dismissal, the parties may, by appearing voluntarily and participating in further proceedings, revest the court with jurisdiction. The elements essential to revesting are (1) active participation by the parties without objection (2) in further proceedings inconsistent with the prior order of dismissal."

In Cuny v. Annunzio (1952), 411 Ill. 613, 617-18, 104 N.E.2d 780, the court found that an administrative review proceeding was defective in failing to include as defendants the administrative agency and the claimant who were necessary parties, and the court said that failure

to object could not operate as a waiver of the express requirement of the statute. Poturalski v. Police Board of the City of Chicago, ____ Ill. App. 2d ____, ____ N.E.2d ____, no. 1-90-3150, filed May 1, 1992, also holds that failure to name parties of record and issue summons on them within the 35-day period cannot be cured by subsequent amendment to the complaint. (Slip op. at 3.) We can find nothing in the Lockett decision to support plaintiff's arguments that failure to name parties of record and issue summons on them within a 35-day period can be cured by the revestment doctrine, by a defendant's general appearance or by filing of the original complaint for administrative review within 35 days of the administrative decision. The trial court properly dismissed plaintiff's complaint.

Therefore, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

McMORROW, JR., with JOHNSON, J., and LINN, J., concurring.

# # # # # # #

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 3, 1993

Mr. Joel A. D'Alba
Asher, Gittler, Greenfield, Cohen & D'Alba, Ltd.
125 S. Wacker Dr., S#1100
Chicago, IL 60606

No. 75104 - Russell Larson, petitioner, v. Board of Fire and Police Commissioners of the City of Calumet City et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

McMorrow, J., took no part.

The mandate of this Court will issue to the Appellate Court on June 25, 1993.

# # # # # # #

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62706

JULEANN HORNYAK
Clerk of the Court

June 24, 1993

Mr. Donald W. Cohen
Asher, Gittler, Greenfield, Cohen & D'Alba, Ltd.
125 S. Wacker Dr.
Chicago, IL 60606

Re: Russell Larson, Petitioner, v. Board of Fire and Police Commissioners of the City of Calumet City, et al., Respondents.

No. 75104

Dear Mr. Cohen:

We are returning the petition for rehearing tendered on June 24, 1993, for filing in the above entitled cause.

The Rules of this Court make no provision for filing a petition for rehearing from an order of this Court denying a petition for leave to appeal. The Clerk of the Supreme Court is directed not to accept or file such petitions for rehearing.

Very truly yours,

/s/

Juleann Hornyak

Clerk of the Supreme Court

# # # # # # #

AN ACT to amend the code of Civil Procedure by changing Section 3-103.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Code of Civil Procedure is amended by changing Section 3-103 as follows:

(735 ILCS 5/3-103 (from Ch. 110, par. 3-103)

Sec. 3-103. Commencement of action. Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby, <u>except that in municipalities with a population of 500,000 or less a complaint filed within the time limit established by this Section may be subsequently amended to add a police chief or a fire chief in cases brought under the Illinois Municipal Code's provisions providing for the discipline of fire fighters and police officers</u>. The method

of service of the decision shall be as provided in the Act governing the procedure before the administrative agency, but if no method is provided, a decision shall be deemed to have been served either when personally delivered or when deposited in the United States mail, in a sealed envelope or package, with postage prepaid, addressed to the party affected thereby at his or her last known residence or place of business.

The form of the summons and the issuance of alias summons shall be according to rules of the Supreme Court.

This amendatory Act of 1993 applies to all cases involving discipline of fire fighters and police officers pending on its effective date and to all cases filed on or after its effective date.

# # # # # # #

NO. 91-3694

IN THE
ILLINOIS APPELLATE COURT
FIRST JUDICIAL DISTRICT

RUSSELL LARSON,
Plaintiff-Appellant,

-vs-

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF CALUMET CITY, ILLINOIS, STEVEN NOWACZYK, EDWARD J. FITZGERALD, GUY L. EVELAND, STEVEN RHOADS, CHIEF OF POLICE AND CALUMET CITY POLICE DEPARTMENT,
Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT CHANCERY DIVISION, NO. 91 CH 0256 THE HONORABLE THOMAS O'BRIEN JUDGE PRESIDING

O R D E R

THIS CAUSE COMING ON TO BE HEARD as the motion of plaintiff-appellant to vacate the order of this Court August 20, 1992 due to a recent change in the Illinois statutes, and the Court being duly advised in the premises,

IT IS HEREBY ORDERED: The motion to vacate the order of August 20, and to return this matter for further proceedings to the Circuit Court of Cook County is DENIED.

Justices Glenn T. Johnson, Robert Cahill and Thomas E. Hoffman

Dated: September 14, 1993

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